United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2174

To be argued by

PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALVIN L. TRUDO,

Appellant,

-against-

UNITED STATES PAROLE BOARD,

Appellee.

Docket No. 76-2174

B
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CALVIN L. TRUDO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

Contents

Table of Cases

Other Authorities

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALVIN L. TRUDO, Appellant, -against- UNITED STATES PAROLE BOARD Appellee.	Docket No. 76-2174

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Question Presented

Whether appellant was improperly denied parole revocation consideration during the term of intervening custody.

Preliminary Statement

This appeal is from an order of the United States District Court for the District of Vermont (The Honorable Albert W. Coffrin) entered on November 8, 1976, denying a petition for writ of habeas corpus (28 U.S.C. §2241) brought by Calvin L. Trudo challenging the legality of United States Parole Board procedures and his custody premised on those procedures.

The Legal Aid Society, Federal Defender Services Unit was assigned by this Court to represent Mr. Trudo on the appeal from the district court order pursuant to the Criminal Justice Act.

Statement of Facts

Appellant filed a petition for writ of habeas corpus in the United States District Court for the District of Vermont attacking federal parole board procedures which failed to give him a parole revocation hearing during a term of custody which was based on a conviction for a crime committed while on federal parole for an earlier federal offense. The new crime constituted the parole violation. (Petition for writ of habeas corpus, Doc. No. 1, 2 to record on appeal.) He also alleged that from the date of the issuance of the parole warrant, on February 11, 1975, until January, 1976, he was unaware of the warrant and detainer, that until his parole revocation hearing on April 5, 1976, he had no forum in which to present miti-

gating evidence to the parole board and that this mitigating evidence was lost and unavailable to him at the April 1976 hearing due to the death of a witness. (Doc. No. 2 and petitioner's reply affidavit and amended response, Doc. No. 8 to Record on Appeal at 6, 9).

The chronology of events as shown in the record below is as follows:

December 11, 1970 - Appellant was sentenced in the United States District Court for the District of Vermont to a term of eighteen years' imprisonment for violation of 18 U.S.C. §2113(d) (Doc. Nos. 1, 3, 20).

September 26, 1974 - Appellant was released on parole supervision by the United States Board of Parole.

November 26, 1974 - Appellant was arrested because he was a felon in possession of a gun (Doc. Nos. 1, 20).

February 10, 1975 - A parole warrant was issued based on the arrest (Doc. No. 7).

March 7, 1975 - Appellant pleaded guilty to a federal weapons charge and was sentenced to eighteen months in custody (Doc. No. 4).

July 10, 1975 - Parole violation detainer was lodged against appellant at the institution in which he was serving his new sentence but he was not given notice of its pendency (Doc. No. 7).

August 8, 1975 - Appellant was given a parole release hearing on the new charge. The parole hearing examiners were not advised of the pending detainer and did not make any decision

with respect to it (Doc. No. 7, affidavit of James E. Newman, United States Parole Board Post Release Analyst*). Appellant states that at this hearing he asked about his parole being revoked but that the examiners stated they had no papers or information concerning his prior parole problems. At this point, appellant advised the examiners that a witness had died (Doc. No. 8 at 4, ¶3 and 4).

January 26 (or 30), 1976 - The new sentence expired and appellant's continued custody was premised on the parole warrant (Doc. Nos. 1, 2, 4, 7, 20).

February 12, 1976 - The Assistant United States Attorney in his affidavit of April 27, 1976, asserts that appellant had a preliminary hearing (Doc. No. 4). The affidavit of Mr. Newman, the parole board case analyst makes no mention of such a hearing (Doc. No. 7) and appellant denies ever having had such a hearing (Doc. No. 8 at 2, ¶2; at 5, ¶6).

April 4, 1976 - A parole revocation hearing was held at which appellant was represented by counsel. At the hearing appellant admitted possession of firearms transported in interstate commerce, unauthorized possession of firearms, and possession of stolen property (Doc. No. 15, Transcript of hearing, at 4 and 5). All the charges were based on the same conduct, and appellant explained that at the request of a Mr. Caputo, who unknown to appellant was an undercover Government informer,

---

*This affidavit contradicts an earlier affidavit of the Assistant United States Attorney who said the August 8 hearing was a revocation proceeding (Doc. No. 4).

the guns were being stored on appellant's property until someone picked them up. Appellant stated that he agreed to store the guns because he was in desperate need of money and he owed money to Caputo who was pressuring him for payment (Doc. No. 15 at 6 through 7). Appellant explained that his financial difficulties were due to the loss of the job he had been promised when released on parole. He also stated that his six year old daughter was having great psychological problems and was under psychiatric care because she had been molested.

Appellant presented a written statement to the examiners in which he explained that before he agreed to store the guns he tried to contact the FBI and local police to seek help from Caputo's pressure, and that both agencies refused any help. Appellant explained in his written statement that a man named Williard Rock heard the conversation with the police, but that Rock was unable to testify because he had died in the Spring of 1975 (Doc. No. 10; annexed hereto as C to appellant's separate appendix).

The hearing examiners revoked appellant's parole and set him over for a new review in December, 1976. In the hearing summary (Doc. No. 7 and 8 to appellant's separate appendix) the examiners set out appellant's explanation of the events, but made no reference to his attempts to contact the FBI or local police and made no comment about the dead witness or the information that appellant said the witness would supply.

March 29, 1976 - Appellant filed his petition for writ of

habeas corpus. In his petition and the reply papers appellant stated he was unaware of the warrant until January 30, 1976, that he had no forum or procedure by which he could present his evidence and that he advised the Board of the lost witness at the first opportunity (the hearing on April 5, 1976)(Doc. No. 8).

November 8, 1976 - Judge Coffrin denied the writ finding that the hearing on April 4, 1976 was constitutionally valid, although the earlier procedures of the Board were not in accord with Shepard v. United States Board of Parole, 541 F.2d 322 (2d Cir. 1976).* The Court went on to determine if the defective pre-April 4, 1976 procedures prejudiced appellant and concluded they had not:

> Petitioner alleges that the intervening death of Willard Rock, a witness who would have testified to mitigating circumstances, presents such prejudice. However, petitioner testified to those mitigating circumstances that he wished the Board to consider, and the Board accepted them at face value. Petitioner was free to submit further evidence in this regard through his own testimony, had he desired to do so. There is nothing to indicate that the Board would have prohibited or disregarded such an offer of evidence. Given these circumstances, the Court concludes, upon its review of the record, that Mr. Rock's testimony would not have added significantly to the evidence before the Board. Thus, no prejudice appears to have resulted to petitioner from Mr. Rock's

---

*On January 17, 1977, the United States Supreme Court vacated the judgment in Shepard and remanded for further consideration in light of Moody v. Daggett, implicitly denying the Government's request for summary reversal (45 U.S.L.W. 3483) (Sup. Ct., January 18, 1977))

unavailability. The Board gave due weight to the mitigating circumstances, but, nonetheless, revoked petitioner's parole on the basis of his admitted violation of the law. The Court holds, therefore, that the delay preceding petitioner's otherwise constitutionally adequate parole revocation hearing did not prejudice petitioner's ability to present mitigating evidence to such an extent as to require the release of petitioner on a writ of habeas corpus.

Appendix B at 5*

---

*The opinion of the district judge is annexed as B to appellant's separate appendix.

ARGUMENT

APPELLANT WAS IMPROPERLY DENIED PAROLE REVOCATION CONSIDERATION DURING THE TERM OF INTERVENING CUSTODY.

A. Introduction

In his opinion the district judge, relying on Shepard v. United States Board of Parole, 541 F.2d 322 (2d Cir. 1976), vacated and remanded, 45 U.S.L.W. 3438 (Sup.Ct. January 18, 1977), concluded that appellant "has a due process right to contest in some meaningful manner the parole violation warrant lodged against him as a detainer" (Appendix B at 3). Judge Coffrin specifically referring to preliminary hearings in January and February, 1976, after the term of the intervening sentence, concluded that the requirements of Shepard were not met and went on to determine if appellant was prejudiced by the defective proceedings.*

Some two months after the Shepard opinion the Supreme Court rendered a decision in Moody v. Daggett, 97 S.Ct. 276 (1976). In that case, Moody was on federal parole from a federal conviction when he committed a new federal crime. Although in 1972, prior to the passage of the Parole Commission and Reorganization Act, Pub.L. 94-233, 90 Stat. 210 et seq. (1976)(hereinafter "the

---

*It must be noted that appellant denies ever having been given any preliminary hearings and the affidavit of the Board's case analyst, while stating the chronology of Board procedures with great specificity, fails to mention any preliminary hearing in January or February.

Act"), he asked for concurrency of his two sentences,* he presented no mitigating evidence to the Board and was told that

---

*This was one of three dispositions available to the old Board. The Supreme Court described the three in Moody:

> After review - or interview - the Board had three options for disposing of its parole violator warrant:
>
> (a) it could execute the warrant immediately and take the parolee into custody. If parole was revoked at that stage, the remainder of the parolee's original federal sentence, reinstated by the parole revocation, would run concurrently with the subsequent sentence from the time of execution of the warrant. 18 U.S.C. §4205 (1970 ed.). Execution of the warrant deprived the parolee of any goodtime credits he may have previously earned on his original sentence under 18 U.S.C. §4161, and of credit for the time spent while on parole. 18 U.S.C. §4205 (1970 ed.); 28 C.F.R. §2.51 (1975).
>
> (b) The Board's second option was to dismiss the warrant and detainer altogether, which operated as a decision not to revoke parole, and under which the parolee retained both his goodtime credit and credit for the time spent on parole. Presumably dismissal of the warrant would reflect a Board decision that the violation of conditions of parole was not of such gravity as to justify revocation.
>
> (c) Third, the Board was free to defer a final decision on parole revocation until expiration of the subsequent sentence, as it elected to do in this case; under this third option, the Board was authorized to execute the warrant, take the parolee into custody immediately upon his release, and then conduct a revocation hearing. Deferral of this decision while permitting the warrant to stand unexecuted would operate to allow the sentence to remain in the status it occupied at the time of the asserted parole violation. 18 U.S.C. §4205 (1970 ed.); it would not deprive the parolee either of his goodtime or of the time spent on parole.
>
> 97 S.Ct. at 277.

Board and was told that the Board would execute the parole violation warrant upon his release from the second sentence.*

Moody filed a petition for writ of habeas corpus. The writ was denied, and the order affirmed on appeal. After the Supreme Court granted a writ of certiorari, the Act was passed. The Act, as well as the newly promulgated rules of the United States Parole Commission, 41 Fed. Reg. 19340 (May 12, 1976), became effective on May 14, 1976. A revised set of rules was promulgated on August 27, 1976 (41 Fed. Reg. 37316, September 3, 1976), effective as of October 4, 1976.

In its decision, the Supreme Court found that Moody had no protected liberty interest in his parole status because his present custody was due to the new conviction and not to the parole warrant. Thus, the postponement of the hearing until after he was in custody solely pursuant to the parole violation warrant was thus not a constitutionally defective procedure.

The Court found that, under the new statute, the Parole Commission could give the effect of concurrent sentences (alternative (a) as outlined by the Supreme Court; see fn. supra at 9) when it would give Moody his revocation hearing at the end of the intervening sentence. The Court also concluded that there was no protected interest in rehabilitation programs in the federal system that might be denied to Moody because of the detainer. Three additional factors were mentioned by the Court: first, that since Moody was in the jurisdiction

---

*This was the Board's third option.

of the same parole authority for both parole release on the new conviction and revocation of parole from the first term of custody, he could use his parole release hearing, with the procedural protections afforded under the Act, to convince the parole officials to revoke parole; second, that the institutional record is a significant factor in arriving at the dispositional decision; and third, that if claims of mitigating evidence are made, "the Commission has the power, as did the Board before it, to conduct an immediate hearing at which petitioner can preserve his evidence." 97 S.Ct. at 279, n.9.

Based on Moody, the Government sought summary reversal of the Second Circuit's Shepard decision (Jurisdictional Statement, United States Parole Commission v. Shepard, Doc. No. 76-752). The Court did not reverse Shepard, but vacated and remanded it for reconsideration under Moody. As with Shepard, this case raises the question of the impact, if any, of Moody.

The circumstances in this case are substantially different from those in Moody and require a different result. Furthermore, this case presents legal issues concerning the Board's procedures upon which the Court did not rule in Moody.**

---

*The impact of Moody is the question currently before this Court in Shelton v. Taylor, Doc. No. 76-2099, which was argued on January 18, 1977.

**Shelton also raised the defects in the Board's failure to comply with its own rules.

B. The Board failed to follow its own procedures; accordingly, appellant was prejudiced because he was unaware of the opportunity to present mitigating evidence to the Board when that evidence was available to him.

In its brief to the Supreme Court in Moody v. Daggett, supra, 97 S.Ct. 276, the Government outlined the procedures of the Parole Board applicable when a parole violation detainer is lodged against an inmate. The Government, apparently relying on the Board's regulation 28 C.F.R. §2.53(a)(1975)* (40 Fed. Reg. 10973 (March 10, 1975)) said that the Board's procedure was to notify the parolee that a detainer had been lodged (Moody brief at 6) and that the Board was to review the case promptly (Moody brief at.39). Prior to the initial file review, the Board's procedure was to invite the parolee to respond (Moody brief at 6-7, 39). Indeed, the

---

*Regulation §2.53(a) stated in part:

> In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

parolee was supposed to be advised "that he may communicate with the Board relative to the disposition of the warrant." See 32 Fed. Reg. 15014, §2.37(c) (October 31, 1967).* It is generally understood that this information might relate to the new crime or to the parolee's reputation and conduct in the community. Jones v. Johnston, 534 F.2d 353, 361 (D.C. Cir. 1976), vacated and mandated sub nom. Reed v. Byrd, 45 U.S.L.W. 3415 (Sup.Ct. December 7, 1976). A prompt dispositional interview would be given if a parolee presented information that, if true, would lead to revocation of parole or withdrawal of the detainer (Moody brief at 6). Further, according to the Government, evidence was to be received at the hearing if it would affect the Board's decision (Moody brief at 6, 30). The Government also asserted (Moody brief at 6) that if no hearing was held or an unfavorable decision rendered, an annual file review would be conducted.

Under the outlined procedure, the Board was supposed to give the parolee notice of his right to present mitigating evidence. However, the appellant's uncontradicted assertions are that he was unaware that a detainer had been lodged against him until he was taken into custody pursuant to the detainer on

---

*This section was the one to which the Board of Parole referred in Smith v. Rivers, 388 F.2d 567 (D.C. Cir. 1967), to amend the Rules published earlier at 27 Fed. Reg. 8437 (August 24, 1962). All the regulations were republished at 28 C.F.R. at 82 et seq. (1974) when the Parole Board also published revised experimental rules, 39 Fed. Reg. 20028 (June 5, 1974), which were initially applicable only to the Northeast Region of the Parole Board, and then were expanded to the Western and South Central Regions of the Board. 39 Fed. Reg. 22861 (June 27, 1974).

January 26, 1976, and that he had no forum in which to present his mitigating evidence until the parole revocation hearing held on April 4, 1976. Although the Government produced the affidavit of James Newman, the case analyst for the Board, which affidavit described in detail the Board procedures followed in this case, no evidence was produced that the Board had communicated with appellant to advise him of his right to communicate with the Board or to present evidence in mitigation.

If appellant, in accordance with the Board's procedures, had been promptly advised of his right to present to the Board an affidavit or statement from Willard Rock he could have obtained the evidence and done so during the term of the intervening sentence and before Rock's death. Not knowing of his rights he was able only to report from his own mouth what Rock would have said and was able to do this only at the conclusion of the new term, after Rock's death.

The available alternative was not an adequate substitute. Indeed, the hearing examiners must have disregarded the self-serving statement for it is not even alluded to in the hearing summary (see D to appellant's appendix). While the examiners have the discretion to accept or reject testimony given at a hearing, here appellant was deprived of his opportunity to present it from the only witness who could have persuaded the examiners of its truthfulness and reliability. The fact that another person could have testified that he heard appellant telephone the local police for their help when he was being pressured by an undercover informer into committing a new crime should have

been a critical factor to the Board's deliberations. The failure by both the police and FBI of appellant's pleas for help was plausible under those circumstances and therefore was substantial impeaching information. However, when the information came, not from the witness who had no interest in the outcome of the hearing but only from the appellant himself, it was evidence considered to be so unpersuasive that the hearing examiners disregarded it. Clearly, Judge Coffrin erred in finding no prejudice, for the evidence was of such significance that it might have prevented execution of the warrant with resulting concurrent sentence or withdrawal of the warrant altogether.

The Board's failure to follow its own procedures, and the resulting prejudice, constitutes a violation of due process, requiring relief. Burton v. Ciccone, 484 F.2d 1322, 1324 (8th Cir. 1973); Maniello v. Norton, 364 F.Supp. 1134, 1136 (D. Conn. 1973); see also Yellin v. United States, 374 U.S. 109, 114 (1963); Vitarelli v. Seaton, 359 U.S. 535, 539 ; Service v. Dulles, 354 U.S. 363 (1957); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Christoffel v. United States, 338 U.S. 84 (1949); Bonham v. Reser, 436 F.2d 751, 754 (2d Cir. 1971); Smith v. Reser, 406 F.2d 141, 145 (2d Cir. 1969); United States v. Jones, 368 F.2d 795 (2d Cir. 1966); Shelton v. United States, 327 F.2d 601, 605 (D.C. Cir. 1963).

C. Appellant had a liberty interest, and thus had a due process right to a revocation hearing prior to the conclusion of his intervening sentence.

Unlike Woody, where no dispositional decision has as yet been made, the Board made its decision to revoke appellant's parole on April 1, 1975. Since this was prior to the effective date of the new Act, the Act has no effect on either the decision or its results. Consequently, appellant cannot receive any benefit from the new Commission's power, as the Supreme Court found, to give the equivalent of concurrent sentences retroactively. Under the now superseded regulations, the Board had no such power; accordingly, once appellant's intervening sentence had been served prior to the Board's decision, there was no opportunity for concurrency. This can be seen by examining the Board's rules.

Of the three dispositional options available to the Board, it chose to wait to act until the conclusion of service of the intervening sentence. At the parole revocation hearing given at the conclusion of the intervening term of custody, the Board had only the dispositional options available to it when the violation was something other than a new conviction. Former 28 C.F.R. §2.55(c)(1975) and §2.55(b)(1975) explain what these options were. Upon a finding of a violation at a parole revocation hearing, the Board could have either revoked parole or reinstated to supervision. The finding of a violation did not require revocation

(Esquivel v. United States, 414 F.2d 607, 608 (10th Cir. 1969); Brown v. Taylor, 237 F.2d 331 (10th Cir. 1961), cert. denied, 366 U.S. 978 (1962); United States ex rel. Cyder v. Kanton, 267 F.Supp. 205, 208 (D. Conn. 1967); United States ex rel. Vann v. Pinto, 243 F.Supp. 344, 346 (D. Conn. 1956); Parole Revocation in the Federal System, Geo. L.R. 705, 731, 735-736 (1969)), and despite such a finding the Board could reinstate to parole supervision. This reinstatement resulted in no loss of credit to the parolee as against his sentence:

> In the absence of a local revocation hearing, the alleged violator is returned to a federal institution to await his revocation hearing at the next visit by a representative of the Board. Following the hearing, the Board determines either that the release is revoked or that there is insufficient cause for revocation. In that latter eventuality, the person is released to further supervision in the community, and the time between the issuance of the warrant and his return to the community is counted toward the running of his sentence.
>
> Annual Report, THE UNITED STATES BOARD OF PAROLE (July 1, 1972 - June 30, 1973) at 27.

On the other hand, the effect of revocation was to require loss of credit for all time from the date of release on parole (18 U.S.C. §4205 (1970); 28 C.F.R. §2.52 (1975); Peacock v. Hughes, 427 F.2d 359 (5th Cir. 1970); Gennaveri v. Richardson, 419 F.2d 1287 (9th Cir. 1969), and cases cited therein), as well as earned good time. Williams v. Taylor, 358 F.2d 669 (10th Cir. 1966).

The parolee was credited with the time only from the date of execution of the warrant, which [illegible] the date of his arrest and return to custody (18 U.S.C. §4205 (1970); 28 C.F.R. §2.51, 2.52(a) (1970). After his return to custody, the Board could compel the parolee to serve any unexpired time up to the maximum release date* (18 U.S.C. §1207 (1970)), in this case, 2,333 days.

Thus, "revocation" and "reinstatement," considered in the context of the other provisions of Title 18 and the regulations, especially those relating to the running and crediting of time (Mastro Plastics Company v. Labor Board, 350 U.S. 270, 285 (1956)), precluded retroactive effect: reinstatement gave total credit; revocation resulted in receipt of credit only from the moment of execution of the warrant, i.e., custody. Thus, to speak in terms of retroactive credit is meaningless.

The policy statement of the Board of Parole demonstrates that the Board did not view itself as having the power to give retroactive credit to a parolee at a final revocation hearing delayed until after completion of an intervening sentence. In its directive effective January 1, 1971, the Board stated: "The prisoner will ordinarily be required to serve the period of that [new] sentence before the hearing is held on such [new

---

*"Unexpired term" means the number of days of the sentence remaining as of the date of parole. Hinsley v. Taylor, supra, 358 F.2d at 690.

crimel violation," and, the Board's statement continued, his violator time "will be served consecutively to the new sentence." Then the Board outlines the procedure by which the parolee may, prior to execution of the new sentence, seek permission to serve some part of the violator sentence concurrently with the new sentence. It is thus clear that the Board viewed the opportunity for concurrent credit as existing only during the duration of the intervening sentence and that, in cases in which the hearing was held after completion of the new sentence, the violator sentence would have run consecutively.

Consistent with the language and scheme of the statutes and regulations and with the Board's policy is the fact that in no other litigation involving a claim that a delayed hearing resulted in prejudice due to the lost opportunity for concurrency has the Board claimed the power to give retroactive sentences. No court found such a power to exist under the old statute and regulations. Since if this power existed many cases could be resolved in the Board's favor, the failure of the Board to make the argument is evidence that the Board had no such power.

For example, in The Parole Board Cases, Smith v. Rivers, White v. U.S. Board of Parole, and Shields v. District of Columbia Board of Parole, 388 F.2d 567, 575 (D.C. Cir. 1967), the parolees had been convicted of a new crime while on federal parole. Federal parole detainers were lodged against them but left unresolved. The parolees admitted that they

had violated parole. They agreed, however, that the Board had a choice of dispositional options:

> ... (1) It may excuse the violation altogether and withdraw the warrant. (2) It may immediately revoke parole. By that action, the parolee is permitted to serve the unexpired portion of his original sentence concurrently with any new sentence imposed for the act constituting the parole violation. (3) It may withhold revocation until the parolee has completed service of his intervening sentence and then revoke parole. That course results, in effect, in consecutive as contrasted with concurrent service of sentence. That is, the violator serves the unexpired portion of his original sentence separately from -- usually after -- the sentence imposed for the criminal offense constituting the violation.
>
> Id., 388 F.2d at 575-576. (Footnotes omitted).

The parolees further argued that the Board's procedures gave them no fixed procedural method for presenting evidence in an effort to get the more favorable dispositions. See Id., 388 F.2d at 576, n.16, n.20.

The Court of Appeals stated:

> We are not prepared to hold that failure to afford a procedure whereby the violator may seek a favorable disposition or an outright refusal to consider proffered evidence in mitigation is immune from judicial review.
>
> Id., 388 F.2d at 576.

However, the court did not render any decision on the issue because counsel for the Board (Id., 388 F.2d at 578) advised the court of a change in the rules that would afford a pro-

cedure. See 32 Fed. Reg. 15811 (1967). The procedure adopted was the discretionary dispositional interview -- the one incorporated in 28 C.F.R. §2.53 (1975). The attorney for the Board never argued that retroactive credit was possible, although if that were the Board's position, no change in the Board's procedure would have been necessary.

All the more recent cases show the similar absence of such an argument. For example, in United States ex rel. Hahn v. Paris, 530 F.2d 632 (7th Cir. 1975), mandate recalled, No. 75-1041 (August 27, 1975), there was a one-year delay in granting a hearing after a state conviction. The Court of Appeals found the delay improper and found that anything less than full release from the restraint of the detainer would leave the parolee with a right without a remedy. Had the Board been able to give retroactive credit after a hearing held at the conclusion of the new term, such a remedy would have been unnecessary, but no such power was urged by the Parole Board.

Similar facts were presented in Cleveland v. Ciccone, 517 F.2d 1182 (8th Cir. 1975), where the Board's own attorney appeared as amicus curiae. Still no argument for the power of granting retroactive concurrency was ever made.

In Goldy v. Michael, 518 F.2d 669 (4th Cir. 1975), petition for cert. filed August 5, 1975, Doc. No. 75-5215, the Court of Appeals decided against the parolee, saying simply that the "last opportunity" for concurrency was not prejudiced, since the Board could, in its discretion, delay a hearing. Similarly, in Jones v. Johnston, 514 F.2d [illegible], 364 (D.C. Cir.

1976), vacated and remanded sub nom. Reed v. Byrd, 45 U.S.L.W. 3413 (Sup.Ct. December 7, 1976) the Board did not argue that it had the power to grant retroactively concurrent terms.

Indeed, while in the proceedings below the Government argued in favor of such a power's existence, no reference was made that would support a conclusion that there was such a power -- no practice, no policy, no statement. The attorney's own interpretation of the power does not have any weight. See Investment Company Institute v. Camp, 401 U.S. 617, 628 (1971).

The decision in Moody emphasizes the Board's lack of power to give retroactive concurrent terms. The Supreme Court said in Moody that the Parole Commission and Reorganization Act incorporates and codifies some of the Board's revocation practices. 97 Sup.Ct. at 276. Significantly the opinion does not equate the dispositional options of the Board and the Commission. Indeed, the opinion implicitly shows the distinctions between the dispositional powers of the old Board and the new Commission by the way the Court outlines those powers.

The Court states that during the period of the intervening sentence, the old Board could revoke and execute the warrant, causing the time on the original sentence to start to run from that moment; or the Board could dismiss the warrant and the parolee would get credit for all time from the date of his release; or the Board could wait until the end of the term of custody. The Court significantly does not state what the dispositional options would have been if the Board took no action

until the end of the term in custody.

On the other hand, in outlining the options of the new Commission, the Court describes the options available when the Commission reserves its action until the end of the intervening sentence: dismissal of the warrant, no revocation, or, "if revocation is chosen, the Commission has the power to grant, retroactively, the equivalent of concurrent sentences..." 97 Sup.Ct. at 279. It is only when referring to the Commission that the Court refers to retroactive concurrency if parole is revoked.

Since Moody was to have his revocation hearing after May 15, 1976, the effective date of the new statute, the Court properly discussed only the dispositional options available to the new Commission which would hold that hearing. The options of the Commission, which include retroactive concurrency even when parole is revoked, cured any prejudice to liberty interests that might result from the institutional review procedures that took place prior to the end of the intervening sentence.

However, in this case, appellant's hearing was held with the prior, more limited, options. The Supreme Court never states or implies that the Board could revoke at the end of the term and give retroactive concurrency.

Since there was no power of the Board to give retroactive credit, the delayed hearing deprived appellant of the very substantial opportunity to get concurrent sentences. It precluded consideration for that purpose of the testimony of a supportive witness.

Accordingly, the Supreme Court's conclusion that, under the Act, no liberty interest is interfered with by postponement of the hearing does not apply here. With the Act not applicable, the postponement of the hearing lengthened the term of total custody or total conditional release on parole. While this is a future deprivation of liberty, protection of future liberty interests is established. Wolff v. McDonnell, 418 U.S. 529 (1974); Peyton v. Rowe, 391 U.S. 54 (1968). Further, the Commission's present ability to terminate parole early (18 U.S.C. §4211) does not cure the defect, since the factors that are likely to be considered in determining whether to terminate parole supervision earlier than required would necessarily relate to the parolee's conduct while on the parole term under consideration. As the most recent events, they would carry more weight than circumstances in mitigation of the crime or conduct while in custody on the intervening sentence.

D. The question of parole revocation was not considered at the parole release proceeding conducted during the term of the intervening sentence.

The Supreme Court noted in Moody that if the jurisdiction in which both the first and the new convictions was rendered is the same, the parole release proceeding will give the parolee the opportunity to persuade the parole authorities to resolve any revocation problem. Here, however, although as appellant alleges, he inquired about the consideration of the revocation issue, at the release hearing held during the intervening sentence the hearing examiners said they had no information about the revocation problems and could do nothing with respect to them. Thus, appellant was deprived of the opportunity to influence the revocation decision even at the release hearing.

Conclusion

For the above-stated reasons, the order below should be reversed and appellant released from custody to parole supervision. Alternatively, he should be given credit for the time spent in custody on the intervening sentence.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CALVIN L. TRUDO
FEDERAL DEFENDER SERVICES UNIT
500 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

February 9, 1977